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### Dissent from the United States Sentencing Commission's Proposed Guidelines

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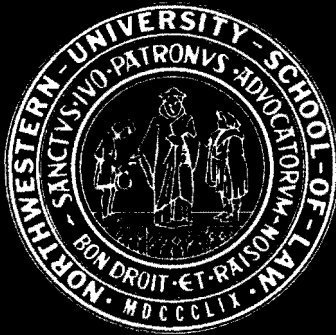
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# The Journal of Criminal Law and Criminology

REPRINT



RESTITUTION, CRIMINAL LAW, AND  
THE IDEOLOGY OF INDIVIDUALITY

*Richard C. Boldt*

DO CRIMINAL OFFENDERS HAVE A  
CONSTITUTIONAL RIGHT TO REHABILITATION?

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## DISSENT FROM THE UNITED STATES SENTENCING COMMISSION'S PROPOSED GUIDELINES

Paul H. Robinson\*

The United States Sentencing Commission's proposed guidelines appeared in January, 1987.\*\* Commissioner Paul H. Robinson dissented strongly from those proposed guidelines. His dissenting opinion follows.

I believe that the Sentencing Reform Act of 1984,<sup>1</sup> which created the United States Sentencing Commission, contains two main directives. First, the Commission's guidelines must provide a rational and principled sentencing system<sup>2</sup> that will further the purposes of just punishment and crime control.<sup>3</sup> Second, the guidelines must reduce unwarranted disparity among sentences for similar offenders who commit similar offenses.<sup>4</sup> The Act provides

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\* Commissioner, United States Sentencing Commission; Adjunct Professor, Georgetown Law Center; Distinguished Professor, Rutgers School of Law—Camden. Diploma of Legal Studies, Cambridge University Law Faculty, 1976; LL.M., Harvard Law School, 1974; J.D., UCLA School of Law, 1973; B.S., Rensselaer Polytechnic Institute, 1970.

\*\* The Commission's final guidelines are scheduled to be promulgated in April, 1987.

<sup>1</sup> Sentencing Reform Act, 98 Stat. 1987 (1984) (codified as 18 U.S.C. 3551 *et seq.* and 28 U.S.C. 991 *et seq.*).

<sup>2</sup> "For the first time, the Federal law will assure that the Federal criminal justice system will adhere to a consistent sentencing philosophy." S. Rep. No. 225, 98th Cong., 1st Sess. 59 (1983) (hereinafter cited as S. Rep. No. 225). "The formulation of sentencing guidelines and policy statements will provide an unprecedented opportunity in the Federal system to look at sentencing patterns as a whole to assure that sentences imposed are consistent with the purposes of sentencing." S. Rep. No. 225 at 51.

<sup>3</sup> See 28 U.S.C. 991(b)(1) (directing the Commission to establish sentencing policies and practices that assure the meeting of the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2)—just punishment, deterrence, incapacitation, and rehabilitation).

<sup>4</sup> See 28 U.S.C. 991(b)(1)(B) (directing the Commission to establish sentencing policies and practices that "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . ."). See also 18 U.S.C. 3553(a)(6) (directing the court "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."). "These provisions underline the major premise of the sentencing guidelines—the need to avoid unwarranted sentencing disparity." S. Rep. No. 225 at 78.

that these objectives are to be achieved through the Commission's promulgation of a comprehensive sentencing system that will bind all federal judges.<sup>5</sup> I opposed the Commission's Preliminary Draft of September, 1986,<sup>6</sup> because I saw it as lacking both guiding principles and an effective means of reducing disparity. While the Commission's current proposed guidelines differ from the Preliminary Draft in many important respects, like its predecessor, this draft is not guided by rational unifying principles and it will not reduce sentencing disparity. Further, the current proposed guidelines transgress specific statutory limitations on the Commission's authority. Because I believe that the proposal violates both the intent and the letter of the Sentencing Reform Act, I cannot in good faith join the other members of the Commission in support of the proposed guidelines.

#### I. A RATIONAL AND PRINCIPLED SENTENCING SYSTEM?

Neither of the Commission's guidelines was drafted with a coherent, articulated sentencing philosophy in mind. Rather, the drafting was done in an ad hoc manner without the guidance of any set of sentencing principles. The inevitable result of this approach is guidelines that are haphazard and internally inconsistent, and that frequently generate improper results; they simply do not consistently and rationally distinguish cases according to relevant offense and offender characteristics.

A comparison of possible guideline sentences for different offenses illustrates one difficulty. Is it appropriate that the sentence for aggravated fish smuggling can be greater than that for armed bank robbery?<sup>7</sup> that the sentence for aggravated forcible sexual con-

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<sup>5</sup> The three key provisions of the Act work together: First, the guidelines are to take into account the relevant offense and offender characteristics. 28 U.S.C. 994(c)-(d). The legislative history directs that the guidelines should "reflect *every* important factor relevant to sentencing." S. Rep. No. 225 at 169 (emphasis added). Second, for each combination of relevant offense and offender characteristics, the maximum of the imprisonment range may not exceed the minimum of that range by more than 25%. 28 U.S.C. 994(b). See also H.R. Rep. No. 614, 99th Cong., 2d Sess. 4 (1986) ("If a guideline calls for imprisonment, the maximum term of imprisonment called for in the guideline cannot exceed the minimum term by more than 25% of the minimum."). Finally, a judge cannot deviate from the guideline range "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ." 18 U.S.C. 3553(b). See also S. Rep. No. 225 at 150 ("It is expected that most sentences will fall within the ranges recommended in the sentencing guidelines.").

<sup>6</sup> Preliminary Draft of Sentencing Guidelines for the United States Courts, 51 Fed. Reg. 35,080 (1986).

<sup>7</sup> Aggravated fish smuggling: Chapter Two, sections Q226 (Level 6), Q226(a)(1) (+3 Levels), (a)(2) (+3 Levels), (a)(3) (+5 Levels), (a)(4) (+8 Levels), (Total = Level

tact with a 13-year-old child can be less than that for submitting a false record on protected wildlife?<sup>8</sup> that the sentence for some antitrust violations can be less than that for failure to surrender a naturalization certificate?<sup>9</sup> that the sentence for involuntary manslaughter can be less than that for impersonating a government employee?<sup>10</sup> that the sentence for inciting a riot can be less than that for altering a motor vehicle ID number?<sup>11</sup> The fact of the matter is that the Commission never systematically ranked offenses.

Further difficulties arise from the guidelines' peculiar two-track structure under which the same factor is in some instances treated under a specific offense guideline and in other instances under a general provision. Consider, for example, the discharge of a firearm. If it is discharged during an assault, the specific assault adjustments apply and the judge need not increase the sentence at all but may increase it by 3 months.<sup>12</sup> If, however, the discharge occurs during serious property destruction, the general adjustment applies and the judge *must* increase the sentence by 3 times that amount (9

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25, maximum 71 months). Armed bank robbery: Chapter Two, sections B231 (Level 20), B231(a)(1) (+3 Levels), (a)(2) (+2 Levels) (Total 25, minimum 57 months).

<sup>8</sup> Aggravated forcible sexual contact with a 13-year old child: Chapter Two, sections A233 (Level 6), A233(a)(1) (+2 Levels), (a)(2) (+3 Levels) (Total = Level 11, minimum 8 months). Submitting a false record on protected wildlife: Chapter Two, sections Q222(2) (Level 4), Q222(a)(3) (+5 Levels), (a)(4) (+3 Levels) (Total = Level 12, maximum 16 months).

<sup>9</sup> Some antitrust violations: Chapter Two, section R221 (Level 6, minimum 0 months). Failure to surrender a naturalization certificate: Chapter Two, section L225 (Level 6, maximum 6 months).

<sup>10</sup> Involuntary manslaughter: Chapter Two, section A216 (Level 10, minimum 6 months). Impersonating a government employee: Chapter Two, section J214 (Level 12, maximum 16 months).

<sup>11</sup> Inciting a riot: Chapter Two, section K241 (Level 7, minimum 1 month). Altering a motor vehicle ID number: Chapter Two, section B261 (Level 10, maximum 12 months).

<sup>12</sup>

	<u>Offense Level</u>	<u>Sentencing Range</u> (in months)
Assault (A221)	15	18-24
Discharge of a gun during assault (A221(a)(1))	+1 = 16	21-27
The sentence for discharging a gun during an assault may be increased by 3 months (27 minus 24).		

months) and may increase it by 7 times that amount (21 months).<sup>13</sup>

Difficulties also arise from the use of invited or directed "departures" from the guidelines. For example, if an offender's prior conviction is similar to the offense at hand, it is suggested that a sentence at the high end of the guideline range may be appropriate.<sup>14</sup> However, if the same prior misconduct did not result in a conviction, the judge is specifically invited to *exceed* the guideline range.<sup>15</sup> Similarly, a recent similar offense—e.g., a 3 year old assault conviction—may increase the guideline sentence by 3 months.<sup>16</sup> If the same conviction is over 10 years old, however, the court is invited to *exceed* the guideline range *without limit*.<sup>17</sup>

Perhaps more troubling is the basic question: are such invited or directed "departures" permitted by the Sentencing Reform Act? If a judge follows an invitation or direction to depart from the guidelines, is the sentence subject to appellate review, as are all deviations from the guidelines?<sup>18</sup> Or, is the sentence free from appellate review because the sentence is precisely what the guidelines invite or direct? The status of the Commission's "guidelines to go outside the guidelines" is further complicated by its attempt to regulate judges after they accept the invitation to depart. The *extent* of the permissible "departure" may be limited, to "not more than 4 levels," for example.<sup>19</sup> One may wonder how such a "departure range" is different from a "guideline range" of 4 levels (a range of between 118% and 300%),<sup>20</sup> which is illegal.<sup>21</sup> By calling a guide-

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	Offense Level	Sentencing Range (in months)
Property Destruction (B213)	4	
more than \$500,001 damage (B213(a)(2))	+9 = 13	12-18
Discharge of a gun during serious property destruction (Y226)	+5 = 18	27-33

The minimum increase for discharging a gun during serious property destruction is 9 months (27 minus 18) and the maximum is 21 months (33 minus 12).

<sup>14</sup> See Chapter Three, section A314 (Similar Prior Convictions).

<sup>15</sup> See Chapter Three, section A313 (Similar Misconduct).

<sup>16</sup> An assault offender (Chapter Two, section A221, Level 15) with no criminal history (Criminal History Category I, Chapter Three, section A311) would have a sentencing range of 18-24 months. The same offender with a 3 year old assault conviction (Criminal History Category II, Chapter Three, section A311(c)) would have a sentencing range of 21-27 months. In other words, because of the prior assault conviction, the court may increase the sentence by up to 3 months (27 minus 24).

<sup>17</sup> See Chapter Three, Commentary to section A312(e) (Applicable Time Period).

<sup>18</sup> See 18 U.S.C. § 3742(a)(3), (b)(3) (directing that sentences outside the guidelines are subject to applicable review).

<sup>19</sup> Chapter Two, section Y218 (Diminished Capacity).

<sup>20</sup> See note 31, *infra*.

<sup>21</sup> See 28 U.S.C. § 994(b), quoted at note 5, *supra*.

line directive a "departure" (a term that does not appear in the Sentencing Reform Act), can the Commission escape from the 25% statutory limitation on the permissible width of a guideline range? Or, one may wonder, can a judge "depart" from a guideline that directs "departure"? If a judge refuses to depart when so directed, is his refusal to depart subject to appellate review?

While the proposed draft obviously does not generate peculiar results in all cases, it is all too easy to find difficulties like those noted above. The true significance of these examples is not the particular problems that they present, but rather that they manifest an unsystematic approach to the complex task of guideline drafting. It is an approach that has produced a flawed structure and drafting of mixed quality.

## II. REDUCTION OF DISPARITY?

In both the proposed draft and the Preliminary Draft, the Commission has failed to meet its obligation to reduce unwarranted sentencing disparity. The earlier Preliminary Draft failed because, while it attempted to meet the legislative mandate of a comprehensive sentencing system,<sup>22</sup> it was not structured in a way that could effectively accommodate the wide variety of possible cases. The draft tried to account for some specific combinations of offense and offender characteristics yet ignored many others and failed to provide a general framework that made application feasible. The result was a complex, inconsistent, and unworkable document. The Preliminary Draft was like a Volkswagen "Bug" trying to pull a fully-loaded three-axle trailer. While it made an earnest effort, it was simply not powerful enough to do the job.

Unfortunately, when it became clear that the Preliminary Draft could not effectively implement a comprehensive system, the Commission's response was not to continue work toward designing a more flexible and workable comprehensive system. Instead, it abandoned the legislative mandate. Rather than trying to find a diesel cab to pull the trailer, the Commission decided to keep the "Bug" and dump the load.

It may well be possible to pull the trailer with the "Bug" because not much is required of guidelines that simply tell the judge to exercise discretion. And that is essentially what the Commission's

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<sup>22</sup> For example, then Attorney General William French Smith testified at Congressional hearings that the Sentencing Reform Act was to introduce "a totally new and comprehensive sentencing system that is based upon a coherent philosophy." S. Rep. No. 225 at 38.

current draft does. The guideline ranges for specific offenses are frequently far in excess of the 25% permitted by statute, and are so broad—as much as 600% and more—as to be of no practical value. Further, the offense ranges may be subject to one or more general adjustments, each of which gives the judge further discretion.

For example, for making illegal payments to influence the actions of a union official, Judge X can, under the guidelines, give the offender 12 months, while Judge Y, *applying the same guidelines in the same case*, can give the offender 60 months (a range of 400%).<sup>23</sup> The offender who leads a prison riot can get 21 months from Judge X and 108 months from Judge Y (a range of 414%), *both under the guidelines*.<sup>24</sup> The offender who bribes a federal legislator in order to influence his vote can get 8 months from Judge X and 57 months from Judge Y (a range of 612%), *both under the guidelines*.<sup>25</sup>

Similarly, the offender who supervises the distribution of obscene matter for sale can get 2 months, or probation, from Judge X and 33 months from Judge Y (a range of 1550%), *both under the guidelines*.<sup>26</sup> If he is convicted of two counts, Judge X can impose concurrent sentences for a total term of 2 months, or probation, while Judge Y can impose consecutive sentences for a total term of 66 months (a range of 3200%), *both under the guidelines*.<sup>27</sup> The offender who is convicted of twice selling stolen guns to a known felon can get 10 months from Judge X and 82 months from Judge Y (a range of 720%), *both under the guidelines*.<sup>28</sup> As long as the sentence is within the guidelines, it is not subject to appellate review.<sup>29</sup>

The examples above are not uncommon; 70% of the 20 most prosecuted offense have one or more ranges in excess of the 25% range authorized by statute. The average of these excessive ranges

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<sup>23</sup> Making illegal payments to influence the actions of union official: Chapter Two, section E259 (Levels 6-12), E259(a)(1) (+6 Levels), (a)(2) (+1-6 Levels) (Total = Levels 13-24, 12-60 months). (The guidance sentence of 63 months is limited by the statutory maximum of 60 months.)

<sup>24</sup> Leading a prison riot: Chapter Two, sections P215 (Level 15-23), Z211 (+1-6 Levels) (Total = Levels 16-29, 21-108 months).

<sup>25</sup> Bribing a federal legislator to influence vote: Chapter Two, sections C211 (Levels 10-15), C211(a)(1) (+1-8 Levels) (Total = Levels 11-23, 8-57 months).

<sup>26</sup> Supervising distribution of obscene matter for sale: Chapter Two, sections G231 (Level 6), G231(a)(1) (+1-6 Levels), Z211 (+1-6 Levels) (Total = Levels 8-18, 2-33 months).

<sup>27</sup> Chapter Five, sections A561 *et seq.* (Consecutive and Concurrent Sentences of Imprisonment).

<sup>28</sup> Chapter Two, sections K223 (Level 9), K223(a)(2) (+2-7 Levels), (a)(4) (+1-4 Levels); Chapter Five, sections A561 *et seq.* (Total = Levels 12-20, 10-82 months).

<sup>29</sup> Parties can appeal a sentence that is within the guidelines only if the sentence is illegal (18 U.S.C. 3742(a)(1) and (b)(1)) or if the sentence was imposed as a result of an incorrect application of the guidelines (18 U.S.C. 3742(a)(2) and (b)(2)).



is well over 600%.<sup>30</sup> In addition to these offense ranges, general adjustments provide other sources of broad discretion: e.g., a range of increase between 118% and 300% (depending on the seriousness of the offense) is available to account for an offender's role in the offense (*also* available is a range of decrease between 118% and 300%); a range between 56% and 166% is available if the offender acknowledges responsibility for the offense (as through a plea of guilty); and a range of between 74% and 200% is available if the offender obstructed the investigation of the case or lied at the trial.<sup>31</sup> Further, in every case of multiple counts the judge has complete discretion in deciding whether to impose concurrent or consecutive sentences.<sup>32</sup> At least one such opportunity for additional broad discretion is likely to exist in nearly every case.<sup>33</sup>

As if the discretion *within* the guidelines were not enough, in over 100 instances the proposed guidelines or their official commentaries invite or direct judges to depart from the guidelines and to exercise their own complete, unguided and frequently unlimited discretion.<sup>34</sup> General rules invite or direct judges to depart from

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<sup>30</sup> See Appendix A.

The average of all of the ranges applicable to the 20 most prosecuted offenses is, by my calculations, 232% (See Appendix B). The Commission has not yet developed information on such matters. I believe that it is critical, however, to determine the percentage of all cases for which, in practice, the applicable range will be in excess of the 25% authorized by statute and the percentage of cases that are likely to result in departures. Another important research project is determining the impact of the proposed guidelines on the prison population. This legislatively-required study will be difficult if not impossible for guidelines that are so discretionary.

<sup>31</sup>

Range	% at Offense Level 10	% at Offense Level 36*
1-6 (role in the offense: Z211)	300	118
1-4 (obstructing the investigation: C311)	200	74
1-3 (acceptance of responsibility: C321)	166	56

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\*Offense level 36 was selected because it is the highest level at which it is not possible to impose a life sentence.

<sup>32</sup> See Chapter Five, sections A561 et seq. (Consecutive and Concurrent Sentences of Imprisonment).

<sup>33</sup> For example, 87% of all federal criminal cases are settled by plea agreement and, of those that go to trial, 63% end in multiple counts of conviction and thus permit the use of the broad concurrent-consecutive discretion. Plea information from the Sourcebook of Criminal Justice Statistics 476 (1985). Multiple count information derived from a cross-tabulation of method of disposition by number of counts using U.S. Sentencing Commission FPSSIS data. (Complete compilation available upon request).

<sup>34</sup> Complete list of departures available upon request.

the guidelines when the offender: had an additional criminal purpose;<sup>35</sup> has a drug dependency leading to an increased propensity to commit crimes;<sup>36</sup> disrupted a governmental function;<sup>37</sup> endangered the public welfare;<sup>38</sup> engaged in ongoing criminal conduct;<sup>39</sup> derived a substantial portion of income from criminal activity;<sup>40</sup> engaged in a pattern of violent criminal conduct<sup>41</sup> or a pattern of civil or administrative violations;<sup>42</sup> cooperated with authorities;<sup>43</sup> or has a criminal history score that, in the court's view, does not adequately reflect the seriousness of his past criminal conduct.<sup>44</sup>

Instead, the judge is told that departure is appropriate if the adjustment range of the guidelines is, in the judge's view, "inadequate."<sup>45</sup> And, as if this were still not enough, judges are told that in cases where the sentence is pursuant to a plea agreement—a common occurrence in the federal system—they are not bound by the guidelines.<sup>46</sup>

The effect of the current draft is simply this: nearly any prison term that might be imposed presently can be imposed after these guidelines go into effect. I do not believe that this is what the Sentencing Reform Act intends, or permits.<sup>47</sup>

Some people argue that we ought not try to reduce the disparity through comprehensive, binding sentencing guidelines. Many wit-

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<sup>35</sup> See Chapter Two, section Y216 (Criminal Purpose).

<sup>36</sup> See Chapter Three, section D314 (Physical Condition, Including Drug Dependence and Alcohol Abuse).

<sup>37</sup> See Chapter Two, section Y212 (Disruption of Governmental Function).

<sup>38</sup> See Chapter Two, section Y215 (Public Welfare).

<sup>39</sup> See Chapter Three, Commentary to section A311 (Criminal History Category).

<sup>40</sup> See Chapter Three, section A316 (Criminal Livelihood).

<sup>41</sup> See Chapter Three, Commentary to section A311 (Criminal History Category).

<sup>42</sup> See Chapter Three, Commentary to section A311 (Criminal History Category).

<sup>43</sup> See Chapter Three, section C331 (Cooperation).

<sup>44</sup> See Chapter Three, section A315 (Adequacy of Criminal History Category).

<sup>45</sup> See Chapter Two, Introduction.

This appears to be in direct conflict with the Sentencing Reform Act. Under the Act, judges may not deviate from the guidelines simply because, in their view, *the guideline range is not adequate* (e.g., because it does not allow the sentence that they want to give). The statute permits deviation only if an aggravating or mitigating circumstance exists that *was not adequately considered by the Sentencing Commission*. 18 U.S.C. 3553(b). If the judge wants to deviate from the guideline range because of a factor already fully considered by the Commission, the statute would bar his deviation but the guidelines attempt to permit it.

<sup>46</sup> See Chapter Four, section A412(b)(2) (Plea Agreements).

<sup>47</sup> It is not enough, of course, for the Commission to simply remove this discretion from these proposed guidelines. That might avoid some of the illegalities of the current draft but it would only increase, dramatically, the number of inappropriate sentences. The solution is to be found, instead, in the construction of a rational system that defines its principles of sentencing and implements them through a sophisticated and workable structure.

nesses before the Commission suggested precisely this.<sup>48</sup> But this issue was hotly debated in Congress and, with passage of the Sentencing Reform Act, was resolved in favor of binding and comprehensive guidelines. Until the Commission has explored all possible methods of performing the Legislature's mandate, it ought not abandon the assigned task.

More importantly, if the Commission ultimately concludes that it cannot perform its task, or at least not in the time allotted, it ought to admit this openly, report to Congress accordingly, and, perhaps, ask for an extension of time.<sup>49</sup> The Commission should not promul-

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<sup>48</sup> One federal judge commented:

I see no objection to telling Congress in a preliminary report: "Ladies and gentlemen, we [the Sentencing Commission] cannot [draft sentencing guidelines] until we have a rational scheme of statutes and until you give us a certain degree of play. Congress may well have made a mistake, and [our attempting the task gives] us the wisdom to make a suggestion for the modification of the statute." You know, I found that in World War II that when a soldier is ordered to shoot somebody that should not be shot, there is the possibility, in extreme circumstances, of turning around and saying, "Don't you think you ought to think about it, Lieutenant, before you order me in there to shoot?" I think maybe you ought to do that to Congress.

Judge Jack Weinstein, Testimony before the United States Sentencing Commission, Public Hearing, New York, New York, pp. 34-35 (Oct. 21, 1986) (transcript from the United States Sentencing Commission). *See also* testimony of Judge Mark Wolf, *id.*, at 62. ("I think Congress had goals and they thought this [the Sentencing Reform Act of 1984] would be a means to achieve those goals. But if the intense scrutiny, and really in many respects, I think, brilliant analysis, indicates that in effect mandatory sentencing is not the right way, the best way, to approach those goals, but an effective presumptive sentencing would be, I myself would think that the sponsors of the original legislation would be quite responsive to you [the Commission] and that their colleagues, too, would be responsive. Is the old system better than this system [the Commission's Preliminary Draft Guidelines]? I think so.").

<sup>49</sup> In a January, 1987 memorandum to the Commission, I suggested that "if the opportunity for legislation arises in the near future, I would propose that we ask for the statutory deadline to be reset to April 1989" based on the following:

Policy development (some of this work has already been done)	4 months
Execution of policy decisions (and policy revision)	7 months
Preliminary Testing:	
Staff and selected probation officers	3 months
Selected-district field tests:	
Training and set-up	1 month
Testing	4 months
Analysis of results	2 months
Full-scale field testing during "advisory period"	6 months
	(27 months)
TOTAL <u>2 years, 3 months</u>	
(assuming that this process were implemented in January, 1987)	

Memorandum of January 5, 1987, from Paul H. Robinson to all Commissioners, "Restructuring and Rescheduling the Commission's Work" (available upon request).

gate guidelines that only create the illusion of reducing disparity. Pretending to have disparity-reducing guidelines is worse than having no guidelines at all. Once the guidelines go into effect, the United States Parole Commission—the single source of uniformity under current practice, unsatisfactory as it may be—will expire under the terms of the Sentencing Reform Act.<sup>50</sup>

I have always applauded the Sentencing Reform Act's abolition of early release on parole and, accordingly, abolition of the Parole Commission, for this moves us toward honesty in sentencing: the sentence publicly imposed by the court would be the sentence served. But I assumed, as Congress clearly did in enacting the Sentencing Reform Act, that the Sentencing Commission's guidelines would replace and improve upon the disparity-reducing function of the Parole Commission.<sup>51</sup> Unfortunately, neither of the Commission's efforts to date will. Instead, the policies and decision-making of the Parole Commission will be replaced by that of 500 plus individual sentencing judges with little in the way of guidance or remedial control. It would be an unfortunate irony in the history of sentencing reform if the Sentencing Reform Act, enacted to reduce disparity, resulted in increased disparity.

### III. COMPLEXITY AND DISCRETION

My final concern arises from the complexity of the Commission's proposed guidelines. Some people see the Commission as facing the horns of a dilemma: a comprehensive system that will reduce disparity appears to require undesirable complexity; on the other hand, given the great variety of cases, the only alternative to complexity is broad discretion and its concomitant disparity. In its current proposal, the Commission has chosen to impale itself squarely on both horns. The guidelines are overwhelmingly complex yet, in the end, they simply defer to the discretion of judges and plea-bargain negotiators.

The Commission's approach of providing both complexity and discretion may well have some political value. Without close examination, one might take the complexity as evidence of significant restraints on discretion, the desired result for those who supported

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<sup>50</sup> 18 U.S.C. 235(b)(1).

<sup>51</sup> The United States Sentencing Commission currently sets prison release dates outside its guidelines in about 20 percent of the cases in its jurisdiction. It is anticipated that judges will impose sentences outside the sentencing guidelines at about the same rate or possibly at a somewhat lower rate since the sentencing guidelines should contain recommendations of appropriate sentences for more detailed combinations of offense and offender characteristics than do the parole guidelines.

S. Rep. No. 225 at 52 n. 71 (citation omitted).

the Sentencing Reform Act. At the same time, those who prefer a discretionary system will be pleased with how the system really works. In addition, if the Commission is not capable of creating a sufficiently sophisticated sentencing system, there is value in deferring to judicial discretion in order to avoid the imposition of improper sentences. I understand both of these points. The Commission has been given an extremely difficult task and asked to perform it quickly under the bright lights generated by strong and conflicting political interests. Nonetheless, a complex *and* discretionary system would have unacceptable consequences that would set back the cause of federal sentencing reform.

Having concluded that the proposed guidelines are not rationally calculated to impose just punishment and to reduce crime, and that they are likely to increase rather than decrease unwarranted disparity, I must, regrettably, oppose the proposed guidelines, as I opposed the Preliminary Draft.

I dissent.

**APPENDIX A**  
**AVAILABLE RANGES FOR THE 20 MOST PROSECUTED OFFENSES**

Rank*	U.S.C. Section	Offense Description	Guideline Section(s)	% Range**
1	21 U.S.C. 841	manufacture, distribute, dispense, create controlled/counterfeited substance	D211	X
2	21 U.S.C. 846	attempt/conspiracy of the above	D218	X
3	18 U.S.C. 2113	bank robbery & incidental crimes	B211 (2113(b)) B221 (2113(a))	1100 X
4	21 U.S.C. 844	simple possession	D221	162.5 200 1100
5	18 U.S.C. 1341	mail frauds & swindles	F211	500 350 275
6	18 U.S.C. 641	embezzling, stealing, converting public property or money	B211	1100
7	18 U.S.C. 656	theft, embezzlement, or misapplication by bank officer or employee	B211	1100
8	18 U.S.C. 1001	falsifying government or records or statements generally	F211	500 350 275
9	8 U.S.C. 1324	bringing in and harboring aliens	L211	X
10	18 U.S.C. 1708	theft or receipt of stolen mail matter generally	B211	1100
11	21 U.S.C. 955	possession of drugs on board vessels	D211	X
12	18 U.S.C. 495	make, utter, alter, or transfer false contracts, deeds, or powers of attorney	B251 (counterfeit) B252 (forgery)	1500 1100
13	21 U.S.C. 843	fraudulent drug distribution	D221 (843(a)(3))  D231-233 (843(a)) D211 (843)	162.5 200 1100 X X
14	18 U.S.C. 2314	transporting stolen goods, securities, moneys, fraudulent state tax stamps or articles used in counterfeiting	B211	1100
15	21 U.S.C. 952	importing controlled substances	D211	X
16	26 U.S.C. 7201	tax evasion	T211	125
17	26 U.S.C. 7203	failure to file a tax return	T212	500
18	18 U.S.C. 1202	receiving, possessing, disposing ransom money	A242	X
19	7 U.S.C. 2024(B)	unauthorized use of food stamps	F211 (addressed in commentary only)  B211 (addressed in commentary only)	500 350 275 1100

Rank	U.S.C. Section	Guideline % Ranges*	Rank	U.S.C. Section	Guideline % Ranges*
		25	18	18 U.S.C. 1202	25
		162.5	19	7 U.S.C. 2024(B)	25
		200			25
		1100			25
		25			25
		25			500
		25			350
		25			275
		25			25
		25			25
14	18 U.S.C. 2314	25			600
		25			25
		600			600
		25			1100
		600			25
		1100	20	18 U.S.C. 1701	25
		25			25
15	21 U.S.C. 952	25			600
		25			25
		25			600
16	26 U.S.C. 7201	25			1100
		125			25
17	26 U.S.C. 7203	25			25
		500			166

Average: The average sentencing range for the 20 most-prosecuted crimes is 232.34% (27,881% total divided by 120 guideline provisions).

\* Accounting for each base offense level and combinations of base offense levels and specific offense characteristics found in a guideline section.

Rank*	U.S.C. Section	Offense Description	Guideline Section(s)	% Range**
20	18 U.S.C. 1701 generally	obstruction of mails	B211 (addressed in commentary only) H234 (addressed in commentary only)	1100 166

Average: 14 out of the 20 offenses provide a range in base offense levels or specific offense characteristics or both. The average percentage of these excessive ranges is 644.11% (17,391% total divided by 27 ranges).

\* From FY 85 statistics collected by United States Sentencing Commission from FPSSIS data; 18 U.S.C. 13 (Assimilated Crimes) excluded.

**\*\*** Figured from base offense level + largest specific offense characteristic range provided.

## APPENDIX B

### PERCENTAGE RANGES FOR THE 20 MOST PROSECUTED OFFENSES

Rank	U.S.C. Section	Guideline % Ranges*	Rank	U.S.C. Section	Guideline % Ranges*
1	21 U.S.C. 841	25			25
		25			600
		25			25
2	21 U.S.C. 846	25			600
3	18 U.S.C. 2113	25			1100
		25			25
		600	8	18 U.S.C. 1001	25
		25			25
		600			25
		1100			25
		25			500
		25			350
		25			275
		25	9	8 U.S.C. 1324	25
		25			25
4	21 U.S.C. 844	25			25
		25			25
		25	10	18 U.S.C. 1708	25
		162.5			25
		200			600
		1100			25
5	18 U.S.C. 1341	25			600
		25			1100
		25			25
		25	11	21 U.S.C. 955	25
		500			25
		350			25
		275	12	18 U.S.C. 495	25
6	18 U.S.C. 641	25			140
		25			1500
		600			25
		25			25
		600			1100
		1100			25
		25	13	21 U.S.C. 843	25
7	18 U.S.C. 656	25			25